No. 77-1866

# In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL BOSWELL, ET AL., PETITIONERS

*v.*

GEORGIA POWER COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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# INDEX



## CITATIONS

Cases:

Cases—Continued



Constitution, statutes, regulation and rule:





Constitution, statutes, regulation and rule—Continued



Miscellaneous:

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 2, 1978. The views expressed are those of the United States and the Federal Energy Regulatory Commission.[1]

[1] Under Section 402(a)(1)(A) and (D) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, to be codified as 42 U.S.C. 7172(a)(1)(A) and (D), this Commission has succeeded to the functions and responsibilities of the former Federal Power Commission with respect to licensing of hydroelectric facilities on navigable waters under Part I

## QUESTION PRESENTED

Whether federal law, rather than the law of the forum state, governs the measure of compensation in condemnation proceedings brought in a federal district court by a federal hydroelectric licensee under the right of eminent domain conferred by Section 21 of the Federal Power Act.

## STATUTES INVOLVED

Section 21 of the Federal Power Act, ch. 285, 41 Stat. 1074, 16 U.S.C. 814, provides:

> That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceedings for that purpose in the district

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of the Federal Power Act, 16 U.S.C. 792 *et seq.*, and certification of natural gas transmission facilities under Section 7 of the Natural Gas Act, 15 U.S.C. 717f.



> court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, that the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 7(h) of the Natural Gas Act, ch. 333, 61 Stat. 459, 15 U.S.C. 717f(h), provides:

> (h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

## STATEMENT

Respondent Georgia Power Company obtained a license from the Federal Power Commission under 16 U.S.C. 797(e) to construct a dam and hydroelectric generating facility on the Oconee River in Georgia. Respondent then initiated eminent domain proceedings in the United States District Court for the Middle District of Georgia under Section 21 of the Federal Power Act, 16 U.S.C. 814, to condemn certain property for the project. The district court instructed the commissioners appointed under Rule 71A of the Federal Rules of Civil Procedure to apply substantive standards of federal rather than Georgia law in determining the amount of compensation to be awarded (Pet. App. 1a-3a).

On consolidated appeals by the landowners, a divided court of appeals affirmed. The court found that Georgia law may allow higher condemnation awards than federal law in three respects (Pet. App. 3a): (1) Georgia may recognize increases in the value of the condemned property that are created by the project for which the property is being taken. (2) A Georgia statute (Ga. Code Ann. § 36-504 (1970)) prohibits setting-off against the value of the property taken the value of benefits conferred by the project on remaining property of the landowner. (3) At the time of the court's decision, Georgia law provided for the award of reasonable attorneys' fees to the condemnee.[2]

[2] Subsequently, on November 22, 1978, the Supreme Court of Georgia overruled prior case law and held that attorneys' fees need not be included in the measure of just compensation under the Georgia Constitution. *DeKalb County* v. *Trustees, Decatur Lodge No. 1602, B.P.O. Elks, et al.*, No. 33628. We are reproducing this opinion as Appendix B, *infra*.



In contrast, federal law does not recognize increases in the value of property taken by eminent domain that are created by the project for which the property is taken. *United States* v. *Reynolds*, 397 U.S. 14, 16-18 (1970); *United States* v. *Miller*, 317 U.S. 369 (1943); *Bauman* v. *Ross*, 167 U.S. 548, 584 (1897). It is also established under federal law that any special benefits to a property owner's remaining properties may be counted in the determination of just compensation for the property taken. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 (1974); *Bauman* v. *Ross*, *supra*, 167 U.S. at 584. Finally, federal law permits recovery of attorneys' fees only as specifically provided by statute, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975);[3] and no statute authorizes the award of such fees against condemnors in actions under Section 21 of the Federal Power Act.

In affirming the district court's choice of federal law, the majority of the court of appeals found the Federal Power Act and its legislative history inconclusive on the standards to be applied in determining the amount of compensation (Pet. App. 5a-11a). The majority held, however, that the measure of com-

[3] But see *United States* v. *1380.09 Acres of Land*, 574 F.2d 238 (5th Cir. 1978), petition for certiorari pending *sub nom. United States* v. *Bodcaw Co.*, No. 78-551.

pensation in Section 21 proceedings should be no different from that used in eminent domain proceedings brought directly by the federal government (Pet. App. 15a, 19a). The majority weighed the competing considerations between federal and state law and concluded that in this context the balance tips toward federal law (Pet. App. 23a). The court thus held that the "federal law defining the minimum compensation requirements of the fifth amendment becomes the law of compensation for a § 21 case" (*id.* at 24a n.25). Judge Simpson dissented, arguing that the federal interests are too remote and speculative to justify application of federal compensation standards to eminent domain proceedings conducted by a private federal licensee (Pet. App. 31a-46a).

## ARGUMENT

1. We first discuss the impact of the decision below on the development of federally licensed water-power projects. Section 21 of the Federal Power Act authorizes licensees, when they cannot acquire by purchase, property or other rights necessary to the construction, maintenance, or operation of the licensed works, to acquire such property or rights by eminent domain, either in the United States district court for the district where the property is located or in the state courts. A parallel provision appears in Section 7(h) of the Natural Gas Act, 15 U.S.C. 717f(h), authorizing holders of certificates of public convenience and necessity for natural gas pipelines to exercise



the right of eminent domain to acquire necessary rights of way and land or other property for the construction, operation, and maintenance of such pipelines and related facilities. Congress has conferred the right of eminent domain on many government agencies [4] and on some federally-chartered corporations.[5] Both Section 21 and Section 7(h) provide that when the authorized condemnation actions are brought in federal courts, "[t]he practice and procedure * * * shall conform as nearly as may be with the practice and procedure in similar action[s] or proceeding[s] in the courts of the State where the property is situated." In *United States* v. *Miller*, 317 U.S. 369, 380 (1943), this Court held that such language does not affect the substantive measure of compensation. The procedural requirements have in any event been superseded by Rule 71A of the Federal Rules of Civil Procedure, governing practice and procedure in condemnation cases.

a. The substantial law of just compensation varies considerably among the states. Georgia's rule recognizing increases in value created by the project itself appears to be a localized deviation from the general rule that only loss to the owner, not benefit to the

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[4] See, *e.g.*, 40 U.S.C. 490 (Administrator of General Services); 39 U.S.C. 5401 (Postal Service).

[5] See, *e.g.*, Section 3, Act of July 2, 1864, ch. 216, 13 Stat. 357 (Union Pacific Railroad); 45 U.S.C. 562(d)(1) (Rail Passenger Service Corporation); 45 U.S.C. 743 (Consolidated Rail Corporation). See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

taker, is compensable, and that therefore no increment is allowed for increases in value due to the project unless the property's particular suitability for such uses would in any event affect its ordinary market value. 3 Nichols, *The Law of Eminent Domain* § 8.61 (1976). Rules concerning the setting-off of "special benefits" [6] conferred on the owner's remaining land against the value of the land taken vary among jurisdictions. Georgia's statute prohibiting such a set-off reflects what is said to be the law of 36 states, 13 of which achieve the result by constitutional provision and 23 by statute or judicial construction. 3 Nichols, *supra*, at §§ 8.6206, 8.6211[2]-8.6211[51]. Rules concerning recovery of attorneys' fees generally depend on specific statutes, which again vary among jurisdictions. 3 Nichols, *supra*, at § 8.64.

Although we have not investigated further, it seems reasonable to assume that other differences exist between the rules measuring compensation in various states and the federal standard.

b. The court of appeals assumed that applying state rather than federal law in condemnation proceedings under Section 21 of the Federal Power Act would result in substantially higher compensation costs, and this assumption is supported by the available indications.

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[6] "[S]pecial benefits" are those that arise from the peculiar relation of the land in question to the public improvement. 3 Nichols, *supra*, at § 8.6203. They contrast with the general benefits to the community at large from completion of the project. *Ibid.* See *Bauman* v. *Ross*, 167 U.S. 548 (1897).



The nation's potential for new development of hydroelectric resources under license from the Commission is substantial. Of the estimated total national resource of 168 million kilowatts of conventional hydroelectric generating capacity, both developed and undeveloped, as of January 1, 1977,[7] only 58.6 million kilowatts had been developed. Thus, undeveloped potential amounted to approximately 110 million kilowatts. Of the developed capacity, a little more than half was owned privately or by non-federal public entities, and approximately 90 percent of that non-federal portion was developed under license from the Federal Power Commission. (As of September 30, 1977, there were 404 major and 95 minor (2,000 horsepower or less) licenses in effect.) Thus, not only is there a large potential for further development, but, if past development is any guide, one may assume that a substantial portion of the further development would take place on non-federal sites under license from the Commission. Development of these sites would require acquisition of land for construction of dams and reservoirs and related generating and transmission facilities, as well as for recreational facilities and for the mitigation of adverse environmental effects.[8]

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[7] These data and those that follow are drawn from the *1977 Final Annual Report of the Federal Power Commission* 26-29, 50-59 (1978).

[8] FPC Order No. 313, 34 F.P.C. 1546, 1549 (1965), declared as a general policy that the Commission expects its licensees "to acquire in fee and include within the project boundary enough land to assure optimum development of the recrea-

During the 1977 fiscal year, the FPC received applications for major licenses, amendments, and permits involving approximately 7.07 million kilowatts of new capacity. As of September 30, 1977, the Commission also had pending 25 applications for preliminary permits.[9] Many pending applications may not result in the development of projects; many that do may not involve significant land acquisition problems. But each pending application has the potential for significant land acquisition costs. Moreover, even completed projects may be affected by the Commission's policy concerning recreational developments at licensed projects (see note 8, *supra*), which in some circumstances might require licensees to acquire additional land around the margin of existing reservoirs.[10]

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tional resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project." 18 C.F.R. 2.7 (1977).

[9] Preliminary permits are issued "for the purpose of enabling applicants for a license [under Part I of the Federal Power Act] to secure the data and to perform the acts required" to develop the evidence needed to support an application. 16 U.S.C. 797(f). The effect of a preliminary permit is to confer priority of application for a license on the permittee for a period not exceeding three years, while necessary project data are prepared. 16 U.S.C. 798.

[10] In addition, federal policy now seeks to promote the development of small hydroelectric power projects. Title IV of the recently enacted Public Utility Regulatory Policies Act (PURPA), Pub. L. No. 95-617, approved November 9, 1978, 92 Stat. 3154, establishes a federal program for the financing



As shown in the table attached as Appendix A to this brief, land acquisition costs have averaged about 10 percent of total project costs, or about $1.7 million per project, for all non-federal projects put into operation from 1920 to 1976. For projects put into operation from 1968 to 1976, the land acquisition costs averaged 9 percent of the project costs, but the average amount of land acquisition costs per project rose to $5.5 million. For projects put into operation from 1970 to 1976, the percentage fell to an average of 7.4 percent of project costs, while the average amount of land acquisition costs per project was $4.3 million.

The foregoing costs have already been incurred and will not be affected by the resolution of the issue presented in this case. They suggest, however, the substantial sums involved in land acquisition costs for Commission-licensed projects now under planning or construction, as well as for projects that may be licensed by the Commission in the future. A project's

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and expeditious authorization of such projects. Section 405 of PURPA provides for simplified licensing procedures by the Federal Energy Regulatory Commission under the Federal Power Act. The new program is limited to the development of projects that will not require new dams or additional impoundment of water (Section 406); it contemplates projects that will generate power from existing dams not presently used for that purpose. Also, the projects must be limited to facilities have not more than 15,000 kilowatts of installed capacity (Section 408(1)). Nevertheless, even such small facilities may require additional land acquisition for water conduits, powerhouses, substations, transmission lines, access roads, recreational facilities, and environmental-impact mitigation.

total costs, including its land acquisition costs, bear directly on its economic feasibility and hence on whether the project will be undertaken. And once a project is undertaken and completed, costs that were incurred for land acquisition are passed on to consumers in the price of the electric power generated. Investment in land acquisition is included in rate-base determinations by the Commission when it regulates interstate wholesale rates for electric power, and by state utility commissions when they set rates for the intrastate sale of power. For these reasons, in the light of the significant differences in land acquisition costs that may result from the choice between federal and state rules for measuring compensation, the choice of the legal standard is a matter of concern to the Commission in carrying out its licensing functions.[11]

The federal government's option under Section 14 of the Federal Power Act (16 U.S.C. 807) to acquire a project at the expiration of its license, to which the court of appeals referred (Pet. App. 25a-26a), is a less important federal interest. Up to September 30, 1977, executive agencies had recommended federal take-over of projects for which the 50-year license had expired in only two cases, each of which involved a

[11] However, the Commission has not, either in its rules and decisions determining what costs for hydroelectric projects are allowable under 16 U.S.C. 797(b) or in its rules and decisions governing rate-making by interstate wholesalers of electricity and natural gas, developed a standard favoring the use of either federal or state criteria in the valuation for land acquisition purposes.



special federal interest.[12] While the future will see an increase in the number of hydroelectric licenses reaching the end of their 50-year term, it cannot be predicted with confidence that many of these projects will be recommended for federal take-over.

With respect to property acquisition costs for natural gas pipelines under Section 7(h) of the Natural Gas Act, much of the property taken in that context consists only of easements for sub-surface rights of way, with the fee interest in the surface retained by the landowner (subject to certain restrictions against inconsistent uses). Moreover, in contrast to reservoirs created by hydroelectric projects, which often confer waterfront or scenic benefits on affected property, natural gas pipelines appear to create no offsetting advantages to properties they traverse. Thus, for pipelines, the present issue appears to have less significance, though the costs of acquisition would still be affected by state rules allowing attorneys' fees, for example.[13]

[12] Both were in part on Indian lands.

[13] Section 7(h) was added to the Natural Gas Act in 1947, 61 Stat. 459, because many states did not confer eminent domain powers on interstate pipeline companies. S. Rep. No. 429, 80th Cong., 1st Sess. (1947). Cases under Section 7(h) of the Natural Gas Act have all arisen in the state courts and appear to have involved damages to adjoining parcels, not valuation. *Gulf Interstate Gas Co.* v. *J. C. Garvin*, 303 S.W. 2d 260 (Ky. 1957); *Florida Gas Transmission Co.* v. *DuPont*, 264 So. 2d 708 (1972 La. App.); *Michigan Wisconsin Pipeline Co.* v. *Fruge*, 227 So. 2d 606 (1969 La. App.); *Lohmann* v. *Natural Gas Pipeline Co. of America*, 434 S.W. 2d 879 (Tex. Civ. App. 1968).

2. Quite apart from its empirical effects on federally-licensed projects, the decision below is correct.

a. Congress has several alternatives in authorizing the use of eminent domain. Congress has the power to authorize public agencies or private corporations to acquire property by the federal power of eminent domain and to pay only the amounts required by the Fifth Amendment. See, *e.g.*, *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U.S. 641, 656-657 (1890). Congress may also authorize the acquisition of property by eminent domain upon payment of more than the amount constitutionally required. See, *e.g.*, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* Congress might even specify that compensation be measured according to state law. *Cf. De Sylva* v. *Ballentine*, 351 U.S. 570, 580-582 (1956).[14]

The measure of compensation under each eminent domain statute depends on congressional intent. Although the legislative history of Section 21 of the Federal Power Act is silent on the point (see Pet. App. 9a-11a), it is reasonable to conclude that Con-

[14] Although the meaning of "property" in the Fifth Amendment normally obtains its content by reference to state law, *United States Ex Rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 279 (1943); *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 604 (1972) (majority and concurrence); *Bishop* v. *Wood*, 426 U.S. 341, 344 n.7, 349 n.14 (1976); cf. *Aquilino* v. *United States*, 363 U.S. 509 (1960), the measure of "just compensation" and the admissibility of evidence concerning just compensation are controlled by federal law under the Fifth Amendment in federal condemnations. *United States* v. *Miller*, 317 U.S. 369, 376-380 (1943); *United States* v. *Reynolds*, 397 U.S. 14, 16-18 (1970).



gress intended in Section 21 to delegate to federal licensees the same power of eminent domain generally available to the federal government, that is, a power subject only to the Fifth Amendment. The eminent domain power delegated and used here was, after all, a *federal* power—a preexisting power whose constitutional limitations were familiar to Congress. If Congress had intended to restrict the exercise of the power more stringently than the Constitution does, or to permit states to do so, it would have been natural to say so. Cf. *FPC* v. *Oregon*, 349 U.S. 435, 445 (1955). But nothing in the legislative history or the language of the statute suggests that Congress intended any measure of compensation other than that generally available to the federal government.

At first glance, the requirement in Section 21 that the practice and procedure of state courts be followed in federal courts suggests such a deviation. But, as this Court observed in *United States* v. *Miller*, 317 U.S. 369, 380 (1943), language of this kind does not affect the measure of compensation. Accord, *United States* v. *93.970 Acres*, 360 U.S. 328, 332-333 (1959). This conclusion is all the clearer in the wake of Rule 71A of the Federal Rules of Civil Procedure, which regulates the practice and procedure in all eminent domain proceedings in federal courts, without regulating the measure of compensation.[15]

[15] When the Federal Power Act was passed in 1920, the Federal Rules of Civil Procedure had not been promulgated, and federal courts borrowed state practice and procedure. Moreover, federal courts were still applying federal common

The landowners argued below, and Judge Simpson in dissent agreed, that state law should be applied under the "choice of law" principles of *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). The argument is that, since the Act is silent on the measure of compensation and the United States is not a party to the proceeding, the lawmaking gap should be filled by reference to state law rather than "federal common law." The Fifth Circuit seemingly proceeded on the assumption that a choice of law was required under *Clearfield Trust*, and then balanced competing interests to conclude that the federal interests prevailed. While the decision is supportable on that basis, in our view the Federal Power Act reveals congressional intent clearly enough to require federal law to be applied.[16]

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law under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), so that it would have been natural for Congress to assume that federal substantive law would govern section 21 proceedings (see Pet. App. 11a n.17).

[16] Admittedly, "the demarcation between 'statutory interpretation' or 'constitutional interpretation,' on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issues at hand attenuates." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973). Still, the alternative to state law here is not "federal common law" in the sense that Congress has enacted no specifically applicable legislation. Rather, this is a case where Congress has conferred a federal power using the specific words—"eminent domain"—normally associated with the traditional power of the federal government to take land subject only to the well-known requirements of the Fifth Amendment.



b. Although we believe the decision below is correct, it may be thought to conflict with at least two brief passages in opinions of the Eighth and Fourth Circuits. A series of seven decisions of the federal district court for Nebraska reached the court of appeals in 1942 (Pet. App. 11a & n.18). One produced the opinion in *Central Nebraska Public Power and Irrigation Dist.* v. *Harrison*, 127 F.2d 588 (8th Cir. 1942). The court of appeals there stated (127 F.2d at 589), without discussion, that the requirement in Section 21 that the practice and procedure of the state courts be followed, including the state court measure of value for compensation purposes. It is not clear whether any part in those proceedings pressed the question whether federal law should apply. In any event, the court's rationale was put to rest in *United States* v. *Miller*, *supra*, 317 U.S. at 380. None of the other six decisions in the Eighth Circuit discussed the question whether state or federal law applied. Each simply applied Nebraska law.

The Fourth Circuit decision was *Oakland Club* v. *South Carolina Public Service Authority*, 30 F. Supp. 334 (D.S.C.), aff'd, 110 F.2d 84, 86 (4th Cir. 1940). The court there reasoned that if Congress had intended to create a federal power of eminent domain, it would have enacted a more complete statute than Section 21—one that set forth the procedure to be followed and the measure of compensation to be allowed. These omissions in Section 21 led the Fourth Circuit to conclude that Congress only intended that licensees

have the power to exercise state-created rights of eminent domain in either federal court or state court.

In view of the brief discussion of the issue in these decisions and the infrequency of its recurrence, we do not believe that the technical conflict with the present decision warrants review of this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979



## APPENDIX A

### LAND COSTS FOR LICENSED HYDROELECTRIC PROJECTS [1]

| Total Cost of Land [2] | Total Cost of Projects [2] | Cost of Land As Average % of Project Cost | Cost of Land As Median % of Project Cost | Total Acres of Pond Area | Cost Per Acre |
|---|---|---|---|---|---|
| FOR ALL PROJECTS BROUGHT ON LINE 1920-1976 [3] | | | | | |
| 434,138 | 4,506,155 | 10% | 6% | 1,287,033 | 2212 |
| FOR PROJECTS BROUGHT ON LINE 1968-1976 [4] | | | | | |
| 103,526 | 1,433,767 | 9% | 3% | 1,060,715 | 5600 |
| FOR PROJECTS BROUGHT ON LINE 1970-1976 [5] | | | | | |
| 38,810 | 844,050 | 7.4% | 3% | 24,319 | 4257 |

[1] Taken from *Hydroelectric Plant Construction Cost and Annual Production Expenses 1978, Twentieth Annual Supplement*, May 31, 1978, U.S. Department of Energy, Energy Information Administration. Figures are for private, state and municipal projects.

[2] In $1000's.

[3] 253 projects.

[4] 19 projects.

[5] 9 projects.

## APPENDIX B

5-E

In the Supreme Court of Georgia

Decided: November 22, 1978

33628. DEKALB COUNTY v. TRUSTEES, DECATUR LODGE NO. 1602, B.P.O. ELKS et al.

MARSHALL, Justice.

The present case is here on certiorari. It involves the award of attorney fees in a condemnation proceeding. A brief review of the development of the law in this area at the outset would be helpful:

In *White* v. *Ga. Power Co.*, 237 Ga. 341, 343 (227 SE2d 385) (1976), this court held that "the words 'just and adequate compensation' contained in our Constitution are to be interpreted by the judiciary to include attorney fees incurred by a condemnee or condemnees in an eminent domain case and are also to be interpreted to include all reasonable and necessary expenses of litigation incurred by such condemnees in eminent domain cases." A three-step procedure was established in *White* for awarding attorney fees and expenses of litigation: First, the factfinder must determine the fair market value of the property actually taken plus consequential damages to any of the condemnees' remaining property that is not taken. Second, the factfinder must determine



whether additional damages should be paid by the condemnor to the condemnee; and if the factfinder determines that additional damages should be paid, such as attorney fees and reasonable and necessary expenses of litigation, the factfinder must make its recommendation to the trial judge to this effect. Third, if such a recommendation is made, the trial judge must conduct an evidentiary hearing and then determine the amount of such recommended damages and award such amount to the condemnee.

*White* v. *Ga. Power*, supra, was reaffirmed in *Dept. of Transp.* v. *Doss*, 238 Ga. 480 (233 SE2d 144) (1977) and it was also held in that case that, implicitly, the award of attorney fees must be reasonable.

In *Dept. of Transp.* v. *Flint River Cotton Mills*, 238 Ga. 717 (235 SE2d 31) (1977), it was held, in accordance with Justice Ingram's concurrence in *White*, 237 Ga. at p. 351, that the purpose of awarding attorney fees and litigation expenses is to reimburse the condemnee for those expenses he must incur in order to obtain the fair market value of his property taken; therefore, in *Flint River Cotton Mills*, the award of attorney fees and expenses of litigation was reversed, since the factfinder had not awarded the condemnee any more for the property than the condemnor had offered.

In the present case, the condemnor offered the condemnee $717,300 for the property. The factfinder, a special master, awarded $844,123 and, in accordance with the procedure set out in *White*, recommended

that attorney fees be awarded. The condemnor presented evidence that based on the valuation of the condemnee's attorney's time at $50 to $100 per hour, a reasonable attorney-fee award would lie in the range of $5,000 to $7,500. (The condemnee's attorney stated in an affidavit submitted to the trial court that he had devoted approximately 50 hours to the case.) The trial court awarded $42,274 in attorney fees, which is one third of the difference between the condemnor's offer and the ultimate award. The Court of Appeals affirmed, holding that in the absence of guidelines from this court to be used in determining the amount of attorney fees awardable in condemnation cases, it would follow the rule that appellate courts are without authority to fix attorney fees (*Reserve Life Ins. Co.* v. *Gay*, 214 Ga. 2, 3 (102 SE2d 492) (1958)); therefore, the Court of Appeals held that it would affirm an attorney-fee award in a condemnation case if there is any evidence to support it, at least in the absence of clear proof that it is the result of bias or prejudice. We granted certiorari. *Held*:

The foregoing recitation of the development of the law in this area by this court illustrates the difficulties encountered when appellate courts attempt to legislate. Almost every appeal of eminent domain judgments which reaches this court raises new questions, most of which could have been answered initially by properly drawn legislation.

We have reached the conclusion that this court was in error in *White* v. *Ga. Power Co.*, 237 Ga. 341,



supra, when it held, "the words 'just and adequate compensation' contained in our Constitution are to be interpreted by the judiciary to include attorney fees incurred by a condemnee or condemnees in an eminent domain case and are also to be interpreted to include all reasonable and necessary expenses of litigation incurred by such condemnees in eminent domain cases."

We now overrule *White* and subsequent cases decided pursuant to its holdings. The reasons for this decision are set forth in the majority opinion in *Bowers* v. *Fulton County*, 227 Ga. 814 (183 SE2d 347) (1971) and Justice Hall's dissenting opinion in *Dept. of Transp.* v. *Doss*, 238 Ga. 480, supra.

We reiterate that the majority of this court does not oppose the award of attorney fees in eminent domain cases. We simply hold that a proper construction of our Constitution does not require such award, and we further hold that this is a matter for legislative determination by the General Assembly.

*Judgment reversed. All the Justices concur, except Nichols, C. J., Undercofler, P. J., and Hill, J., who dissent.*

UNDERCOFLER, Presiding Justice, dissenting.

It is not right; it is not fair; it is not due process; and it is not constitutional for the government, or a public utility, to take your land without fully compensating you. In this country, a basic freedom is the right to own and possess land. When you are forced to surrender it for the public good, you must be of-

fered its fair price. If you are forced to sue to obtain its fair price then you must also recover the reasonable costs, including attorney fees, of waging the battle; otherwise, you are not fully compensated and have been mistreated, however unintentionally. For example, if the State or utility offers you $10,000 for your land and a jury finds its real value to be $25,000 out of which you must pay your costs of litigation, including attorney fees, you have remaining a sum less than the real value of your land. Thus, you have been penalized for having to sue to enforce your right to be fully compensated by the government or utility whose expenses, including attorney fees, are paid by your taxes and your utility rates. The majority of this court holds to the contrary and I dissent.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-1866**

PAUL BOSWELL, ET AL., *Petitioners*

v.

GEORGIA POWER COMPANY, *Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## RESPONSE OF PETITIONERS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

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## RESPONSE OF PETITIONERS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This supplemental response addresses the Brief for the United States as Amicus Curiae (hereinafter the "Amicus Brief"), which takes a position adverse to that of the petitioners.[1] The petitioners have asserted

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[1] It should be noted that the views expressed by the United States in the Amicus Brief do not seem to accord with its position in the court below. In the court of appeals, the United States filed a document entitled "Memorandum of Federal Power Commission as Amicus Curiae" in which the FPC declined the court of appeals' invitation to file an amicus brief addressed to the constitutionality of Section 21 of the Federal Power Act and noted: "*Nor does the Commission believe it necessary to file a brief addressed to the principal issue presented by this appeal:* Whether state law or federal law should apply to eminent domain proceedings conducted by

two major reasons for granting a writ of certiorari in this case: (1) the need for resolution of the conflict between the decision of the Fifth Circuit Court of Appeals here and earlier decisions of the Courts of Appeals of the Fourth, Eighth and Ninth Circuits, and (2) the pressing need to resolve the direct conflict between the decision below and the choice of law principles developed by this Court in *Bank of America* v. *Parnell,* 352 U.S. 29 (1956) and its progeny. The amicus concluded that the writ should be denied. However, petitioners submit that an analysis of the Amicus Brief, its ultimate conclusion notwithstanding, supports the necessity for review by this Court.

**1. The United States Recognizes the Conflict Between the Decision of the Fifth Circuit Court of Appeals and the Decisions of the Eighth and Fourth Circuit Courts of Appeals.**

By acknowledging the conflict of decisions between the circuits, the United States accords with the view of the landowners and rejects the view of Georgia Power. Amicus Brief, pp. 17-18. The amicus has attempted, however, to minimize the effect of this conflict between the circuits by asserting that, because of "the infrequency of its recurrence," this issue does not warrant review. Amicus Brief, p. 18.

The amicus' assertion of infrequent recurrence of this issue simply does not square with the facts and figures set forth in the earlier portion of the Amicus Brief, which describe the predicted frequency of future

federally licensed hydroelectric power companies pursuant to Section 21 of the Power Act." Memorandum of Federal Power Commission as Amicus Curiae, at p. 2 (emphasis added). The Federal Energy Regulatory Commission, the amicus curiae here, has now succeeded to the functions and responsibilities of the Federal Power Commission.



hydroelectric development by Commission licensees.[2] Rather, the very figures cited by the United States clearly indicate that the issue in this case will most certainly recur. Thus, this Court should grant certiorari to dispose of the issue it expressly left open in *Grand River Dam Authority* v. *Grand Hydro,* 335 U.S. 359, 373 (1948), and resolve the acknowledged conflict between the circuits on this issue.

**2. The Amicus Has Failed to Address the Direct Conflict Between the Decision Below and the Choice of Law Principles Developed by This Court in *Bank of America* v. *Parnell,* 352 U.S. 29 (1956) and Its Progeny.**

This Court invited the Solicitor General's views in this case to aid in determining whether the interests of the federal government here are so significant as to require the formulation and application of a federal common law under Section 21 of the Federal Power Act. Presumably, the United States could have specifically pointed out what, if any, of its substantial

[2] The United States notes, for example, that the federal rule concerning the set-off of benefits to the remainder is different from the rule in 36 states. Further, the United States points out that over 65% of the national hydroelectric generating capacity has not yet been developed; that historically about 45% of this capacity has been developed privately under Commission licenses; and that as of September 30, 1977, the FPC had 25 pending applications for preliminary permits. Amicus Brief, pp. 8-10. Thus, approximately 30% of all future hydroelectric development will be undertaken by licensees in states where there are substantial differences between state and federal rules of valuation. Additionally, since the decision below is the first reported decision squarely applying a federal common law in Section 21 condemnations, one can only assume that licensees in those 36 states where the state laws are more favorable to the landowner will now begin to invoke Section 21 and attempt to apply the federal rules here formulated to the exclusion of state eminent domain laws.

rights or duties would be subjected to "exceptional uncertainty" by the application of state law. *Miree* v. *DeKalb County,* 433 U.S. 25 (1977). Presumably, it could have specifically demonstrated the "significant conflict between some federal policy or interest and the use of state law." *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966). Presumably, it could have demonstrated how the federal program or interest to be protected by application of a federal common law must be "uniform in character throughout the nation." *United States* v. *Yazell,* 382 U.S. 341 (1966). The failure of the United States to squarely address these important questions is significant. The inability to demonstrate any exceptional uncertainty, significant conflict or need for uniformity implies a lack of overriding federal interests.

Instead of demonstrating an overriding federal interest, the most that the United States can say is that "in the light of the significant differences in land acquisition costs that *may* result from the choice between federal and state rules for measuring compensation, the choice of the legal standard is a *matter of concern* to the Commission in carrying out its licensing functions." Amicus Brief, p. 12 (emphasis added). This is hardly a statement of a "significant conflict" between federal policy and the use of Georgia law which has been required by this Court for the creation and application of a federal common law. *Miree* v. *DeKalb County,* 433 U.S. 25 (1977); *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966).

Instead of directly addressing the choice of law test, the amicus takes the anomalous position that this is not really a choice of law case, thus rejecting the basic



analytical approach taken by both the majority and dissent in the court of appeals and by the district court before that. Amicus Brief, p. 16. However, even if the decision of the court below is correct, but for the wrong reasons as the amicus argues, the precedential effect of the Fifth Circuit's newly devised "balancing test" demands a review of this novel approach to choice of law questions, an approach which will have widespread ramifications far beyond the scope of Section 21.

**3. The Amicus' View That a Congressional Intent Is Evidenced on the Face of Section 21 Conflicts With the Views of All Circuit Courts of Appeals Which Have Addressed the Issue.**

The amicus has asserted that a congressional intent to apply federal rules of valuation may somehow be perceived by an analysis of Section 21 itself and seems to conclude that the issue in this case should be decided on that basis. However, the courts of appeals for both the Fourth and Eighth Circuits have failed to perceive such an intent. *Central Nebraska Public Power and Irrigation District* v. *Harrison,* 127 F.2d 588 (8th Cir. 1942); *Oakland Club* v. *South Carolina Public Service Authority,* 110 F.2d 84, 86 (4th Cir. 1940). And in fact, both the majority and dissent in this case were unable to find any such Congressional direction "in either the language of Section 21 or its legislative history." Pet. App., pp. 7a, 30a-31a.[3]

[3] An historical overview of federal condemnation statutes would, in fact, strongly support an argument that the congressional intent was to use state laws. In certain laws Congress specifically provided that special benefits could offset the value of the land taken in determining just compensation. Rivers and Harbors Act, 33 U.S.C.A. § 595, (1970); Mississippi River Flood Control Act, 33 U.S.C.A. § 702d (1970). One might logically conclude that by failing specifically to so provide for this offset in Section 21 of the Federal Power Act, Congress evidenced an intent that such an offset not

This argument, like the argument of respondent Georgia Power Company, that the Fifth Amendment to the United States Constitution somehow requires the application of federal, rather than state, rules of valuation simply begs the choice of law question. The states are also subject to the Fifth Amendment and cannot take property for less than just compensation as set forth in the Fifth Amendment; the question here is not whether or not the Fifth Amendment applies, since it applies in every case. Rather, the question is whether state law will be chosen to fill the "statutory interstices" or whether some overriding federal interest requires the formulation and application of a federal common law of valuation under Section 21. Obviously, that question cannot be answered by mere reference to the face of the Federal Power Act itself or to the Constitution.

**4. The Amicus' Empirical Data Upsets the Conclusions of the Majority Below.**

The majority below found a necessity for implementing a federal common law primarily because of its determination that use of state law could interfere with Congressional aims (1) by increasing the costs of hydroelectric projects thereby placing a chill on development and causing higher utility rates, and (2) by failing to minimize the federal government's option

be allowed. This omission in Section 21 becomes all the more revealing when one realizes that the Rivers and Harbors Act became law in 1918, the Federal Power Act in 1920, and the Mississippi River Flood Control Act in 1928. Thus the non-specific Federal Power Act is straddled chronologically by statutes which specifically require the offset of benefits to the remainder against the value of the land taken.



price under Section 14 of the Federal Power Act. Pet. App., pp. 24a-26a. While it is recognized that these findings should be dealt with in the argument of the case on the merits, the empirical data offered by the amicus deserves comment with regard to its implications as to the finding below.

First, the United States recognizes that the minimization of the Section 14 option price is "a less important federal interest," because the likelihood of the exercise of the Section 14 option is factually remote. Amicus Brief, pp. 12-13.[4] The impact of this factual statement upon the decision of the court below cannot be overstated, because the Section 14 option was the only factor isolated in the balancing test below which could conceivably have had the "direct effect upon the United States or its Treasury" as required in *Miree* v. *DeKalb County*, 433 U.S. 25 (1977).

Secondly, in assessing the impact of the amicus' empirical data upon the majority's crucial determination below that the use of state laws would so increase the cost of hydroelectric projects as to chill development, one must keep in mind two very important points: (a) *many licensees have historically used state substantive measures to condemn property for hydroelectric projects,*[5] and a number of major hydroelectric projects

[4] This factual statement is not surprising since under Section 7(b) of the Federal Power Act, 16 U.S.C. § 800(b), the Commission may not issue a license where it has found that "the development of any water resources for public purposes should be undertaken by the United States itself."

[5] *King* v. *Grand River Dam Authority*, 336 F.2d 682 (10th Cir. 1964); *Central Nebraska Public Power and Irrigation District* v. *Harrison*, 127 F.2d 588 (8th Cir. 1942); *Oakland Club* v. *South Carolina Public Service Authority*, 110 F.2d 84, 86 (4th Cir. 1940).

have been developed by non-federal, non-licensees who did not even have access to federal courts[6]; and (b) the data presented by the amicus do not even suggest the extent of any increase in cost from application of state law or shed any light on whether that increase is significant enough to chill hydroelectric development.[7] Thus, the United States has essentially eliminated both elements of the supposed federal interest which the court below found to tip the scale in favor of application of a federal common law under Section 21. Pet. App., 23a-26a; see also Judge Simpson's dissent on the point at Pet. App. 41a-44a.

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In fact, when condemning land for Lake Sinclair, the sister project to Lake Wallace, Georgia Power Company used state substantive rules of valuation. *Georgia Power Company* v. *148.577 Acres of Land*, Civil Action No. 892 (M.D. Ga., judgment entered January 24, 1952). And the absence of any other cases presenting this issue implies a widespread use of state laws by licensees, since the laws of 36 states are apparently distinguishable from the bare Fifth Amendment protections.

[6] Of the 311 non-federal plants for which detailed data was presented by the Department of Energy, only 245 are operated under FPC licenses. Thus, over 21% of the major non-federal hydroelectric plants are non-licensed projects owned by private, municipal or state entities. *Hydroelectric Plant Construction Cost and Annual Production Expenses 1976, Twentieth Annual Supplement*, May 31, 1978, U.S. Department of Energy, Energy Information Administration, page v.

[7] For example, "cost of land" as outlined in Appendix A of the Amicus Brief may include substantial sums not related to any rule of valuation, such as attorneys' fees, appraisals, and engineering costs; and it certainly includes the cost of significant amounts of land which would not be substantially affected by this decision because they were "total takings" and could not involve a set-off of benefits.



## CONCLUSION

The courts of appeals have rendered conflicting decisions with respect to the question presented, upon which this Court has heretofore expressly reserved opinion. The issue is likely to frequently recur. In addition, the decision below develops a "balancing test" which ignores most of the choice of law principles developed by this Court. Finally, in implementing the "balancing test", the court below relied on crucial factual determinations which have been substantially discredited by the Amicus Brief. Because of the implication of the decision below on not only Section 21 condemnations but on all future choice of law questions in the federal courts, this Court should grant certiorari.

Respectfully submitted,

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